

UNITED STATES OF AMERICA)	
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)	Prosecution Reply to Defense Response to
)	Motion to Continue
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v.)	
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)	
AHMED KHALFAN GHAILANI a.k.a.,)	
“FUPI,” “HAYTHAM,”)	
“ABUBAKAR KHALFAN)	
AHMED,” and “SHARIF OMAR”)	
)	
)	
)	28 January 2009

1. Timeliness. This reply is filed in accordance with the timelines specified by Rule 3 6(c)(2) and Rule 1. 6. of the Military Commissions Trial Judiciary Rules of Court, issued on 2 November 2007.

2. Relief. This brief is filed in reply to the Defense Response to the Government’s Motion for a 120-Day Continuance in the Interests of Justice which was filed on 23 January 2009.

3. Overview. Contrary to the assertions set forth in the defense response, the Government’s motion to continue is not “in conflict” with the Executive Order issued by the President on 22 January 2009, is neither uncertain nor indefinite, and does not make “clear” that the Government is “either unable or unwilling to bring the accused to trial in an expeditious manner.”

The defense response contains a number of mischaracterizations and misstatements which will be addressed in this reply.

Contrary to defense assertions, dismissal of all charges¹ is not the “appropriate and lawful manner” to comply with the President’s order to “halt” the proceedings.

4. Burden of proof. As the moving party, the government has the burden of persuasion on any factual issue the resolution of which is necessary to decide this motion. *See* R.M.C. 905(c)(2). The burden of proof on any factual issue the resolution of which is necessary to decide a motion shall be by a preponderance of the evidence. *See* R.M.C. 905(c)(1).

¹ The Government is not treating the defense response to the motion to continue as a motion to dismiss these charges. Any motion to dismiss the charges should be made pursuant to the requirements set forth in Rule 3 of the Military Commissions Trial Judiciary Rules of Court, issued on 2 November 2007.

5. Facts. On 23 January 2009, the Government filed its Motion for a 120-Day Continuance in the Interests of Justice. On 23 January 2009, the Defense filed its Response to this motion.

6. Discussion.

A. The Government's motion is not in conflict with the Executive Order issued by the President on 22 January 2009. In fact, it is in compliance with that Executive Order and the resulting order of the Honorable Robert Gates, Secretary of Defense. The Defense asserts that the request for a continuance "is in direct conflict with the order of the President" since the order "directs the Secretary of Defense to take steps to 'halt' the proceedings ... not to take steps to 'continue' them as the prosecution so requests."² (Defense Response at 3.) Defense's interpretation of the Executive Order ignores the plain language of that Order.

Section 2, paragraphs (f) and (g) of the Executive Order state as follows:

(f) Some individuals currently detained at Guantanamo may have committed offenses for which they should be prosecuted. It is in the interests of the United States to review whether and how any such individuals can and should be prosecuted.

(g) It is in the interests of the United States that the executive branch conduct a prompt and thorough review of the circumstances of the individuals currently detained at Guantanamo who have been charged with offenses before military commissions pursuant to the Military Commissions Act of 2006, Public Law 109-366, as well as of the military commissions process more generally.

Section 4, paragraph (c)(3) of the Executive Order states as follows:

(c)(3) Determination of Prosecution. In accordance with United States law, the cases of individuals detained at Guantanamo not approved for release or transfer shall be evaluated to determine whether the Federal Government should seek to prosecute the detained individuals for any offenses they may have committed, including whether it is feasible to prosecute such individuals before a court established pursuant to Article III of the United States Constitution, and the Review participants shall in turn take the necessary and appropriate steps based on such determinations.

Section 7 of the Executive Order directs the Secretary of Defense to "immediately take steps to ensure that during the pendency of the Review ... that all proceedings of such military

² One can only conclude that Defense is also of the opinion that the order of the Secretary of Defense directing the Chief Prosecutor of the Office of Military Commissions "to seek continuances for 120 days in any cases that have already been referred" violates the President's order to "halt" the proceedings. The Government submits that the Secretary of Defense is in a far better position to correctly interpret the President's Order and to assess the appropriate manner in which to execute such order than the Defense.

commissions to which charges have been referred but in which no judgment has been rendered ... are halted.”

Pursuant to this Executive Order, the Secretary of Defense directed the Chief Prosecutor of the Office of Military Commissions to “seek continuances for 120 days in any cases that have already been referred” in order to give the Administration “sufficient time to conduct a review of detainees currently held at Guantanamo, to evaluate the cases of detainees not approved for release or transfer to determine whether prosecution may be warranted for any offenses these detainees may have committed, and to determine which forum best suits any future prosecution.”

This Executive Order, when read in its entirety, cannot be interpreted to require dismissal of the charges. The President’s Order to “halt” the proceedings of those military commissions to which charges have been referred and the resulting direction by the Secretary of Defense is an effort to allow the necessary and appropriate time to conduct the ordered Review for the appropriate disposition of these matters. Therefore, dismissal of these charges, rather than a continuance, would be inconsistent with the intent of the Commander-in-Chief.

B. The Government objects to a number of Defense statements contained in its Response. The Defense asserts throughout its response that the request for the continuance is an admission that the Government is “not ready to proceed to trial” and that the Government is “not confident that this case will ever go to trial.” (Defense Response at 5.) Additionally, the Defense claims that the Government “can not comply with its obligations under the United States Constitution and R.M.C. 707.” (Defense Response at 6.) Finally, throughout its response, Defense insinuates that the filing of the motion to continue is a sign that the Government’s earlier announcements that it was ready to proceed to trial within the 120-day time limit set forth in R.M.C. 707 were made in bad faith. These assertions are false.

It should be noted that it was the Defense, pursuant to its “Defense Motion for Appropriate Relief (Proposed Trial Schedule)” dated 20 October 2008 (AE-15), that requested a trial date of 15 Jul-21 Aug 09. In this motion, the Defense agreed “that all delay from the date of this request [20 October 2008] until the date of trial is attributable to the Defense and excludable under Rule for Military Commissions 707.”³ The Government announced both in its response to the defense motion and at the arraignment of the accused that it was prepared to meet the time requirements set forth in R.M.C. 707. Pursuant to the defense request, the military judge set the date of 13 July 2009 for the “Assembly and Voir Dire for Panel Members and the date of 15 July 2009 for the beginning of the trial on the merits.

³ R.M.C. 707 (a)(2) states that “[w]ithin 120 days of the service of charges, the military judge shall announce the assembly of the military commission, in accordance with R.M.C. 911.” In the instant matter, the accused was served with the referred charges on 10 October 2008. The Defense filed its motion to continue on or about 20 October 2008. The military judge set the date of 13 July 2009 for the “Assembly and Voir Dire for Panel Members and the date of 15 July 2009 for the beginning of the trial on the merits, and excluded all time between the date the defense motion to continue was filed and 13 July 2009. The Government submits that on 13 July 2009, it would still have approximately 108 days to bring the accused to trial and remain in compliance with R.M.C. 707.

The Government submits that it has been, and will be prepared to meet the requirements set forth in R.M.C. 707.

C. Finally, the Government points out that the fact the accused has been detained by the United States for some period of time is not a relevant consideration in weighing the interests of justice against the interests of the accused and the public to a speedy trial. While the fact of pretrial confinement would normally be a consideration in evaluating the justice of a continuance, in this case, the accused is not being held in pretrial confinement, but rather is being detained on the independent and sufficient basis that he is an enemy combatant. Thus, granting a continuance of the accused's case to permit the Administration to conduct a review of his case, and of the commissions process, generally, will not cause the accused to spend any additional time in detention.

7. **Oral Argument.** The Prosecution does not request oral argument.

8. **Witnesses.** The Prosecution does not anticipate calling witnesses in connection with this reply.

9. **Certificate of Conference.** A conference with defense regarding this reply is not required. *See* Military Commissions Trial Judiciary Rules of Court, issued on 2 November 2007, Form 3-3 Format for a Reply.

10. **Additional Information.** None.

11. **Attachments.** None.

12. **Submitted by:**

\\signed\\
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\\signed\\
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